

# FOR PUBLICATION

## UNITED STATES BANKRUPTCY COURT SOUTHERN DISTRICT OF CALIFORNIA

**In re**

**DAVID L. PRUITT and SEA  
COAST GREENHOUSES, LLC.**

**Debtor.**

**Case No. 02-01762-A7  
[Substantively Consolidated]**

**MEMORANDUM DECISION  
DENYING MOTION FOR  
RECONSIDERATION AND  
VACATING HEARING DATE**

### **I.**

### **INTRODUCTION**

Richard M. Kipperman, chapter 7 trustee in the above-identified cases ("Trustee"), filed a Motion for Relief from Order and Motion for Relief from this Court's Memorandum Decision and Order thereon entered December 17, 2004 ("Motion"). The Court's Memorandum Decision and Order thereon denied the Trustee's request for enhanced final compensation of \$159,185.27 in fees and \$2,202.57 in costs which would have equated to paying the Trustee \$1,413.63/hr. for his services in this chapter 7 case. Based upon its careful review of the record, the Court awarded the Trustee reasonable final compensation of \$41,608.50 and costs of \$1,516.61 which it calculated by multiplying the number of hours billed by the Trustee and his staff by their normal hourly rates.

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1 The Motion argues the Court erred in denying the Trustee his enhanced  
2 compensation request. For the reasons set forth below, the Motion is denied and the  
3 hearing calendared for February 3, 2005, is vacated as improvidently scheduled.

## 4 II.

### 5 ANALYSIS

6 The Motion was filed within ten days of entry of the December 17, 2004 Order.  
7 Therefore, although it seeks relief from the Order pursuant to Fed. Rule Civ. P. 60(b)  
8 and Fed. Rule Bankr. P. 9024, the Court will treat it as a motion for reconsideration  
9 governed by Fed. R. Civ. P. 59 and Fed. R. Bankr. P. 9023. *See In re Captain*  
10 *Blythers, Inc.*, 311 B.R. 530, 539 (9<sup>th</sup> Cir. BAP 2004)(indicating a motion brought  
11 within ten days of entry of an order is treated as a motion for reconsideration  
12 governed by Federal Rule 59(a); whereas a motion filed after the ten-day period of  
13 entry of an order is construed as a motion for relief from judgment governed by  
14 Federal Rule 60(b)); *see also* Federal Rule 60(b)(indicating this rule applies to a  
15 “final” judgment or order).

16 A court has wide discretion in deciding whether to reconsider its own  
17 judgments or orders. *In re JWJ Contracting Co., Inc.*, 287 B.R. 501, 502 (9<sup>th</sup> Cir. BAP  
18 2002), *aff’d* 371 F.3d 1079 (9<sup>th</sup> Cir. 2004). Reconsideration is appropriate only if the  
19 movant demonstrates: 1) a manifest error of fact; 2) a manifest error of law; or  
20 3) newly discovered evidence. *JWJ Contracting*, 287 B.R. at 514. Moreover, if the  
21 motion is based upon newly discovered evidence, the movant must show that 1) the  
22 evidence was discovered after trial; 2) the exercise of due diligence would not have  
23 resulted in the evidence being discovered at an earlier stage; and 3) the newly  
24 discovered evidence is of such magnitude that production of it earlier would likely  
25 have changed the outcome of the case. *In re La Sierra Financial Serv., Inc.*, 290 B.R.  
26 718, 733 (9<sup>th</sup> Cir. BAP 2002).

27 The Trustee’s Motion assiduously avoids the standards for reconsideration.  
28 Instead, the Trustee and his counsel utilize the Motion as a transparent attempt to

1 convey their displeasure with the Court's ruling and to lay before the Court hearsay  
2 statements of other counsel which, in this Court's view, are an improper attempt to  
3 dissuade the Court from its task of attempting to control excessive fee requests. In  
4 supposed support of the criteria for reconsideration, the Trustee's counsel Timothy Truxaw  
5 submitted a declaration replete with hearsay ("Declaration"). [Docket # 850] For  
6 example:

7 1. "I received a voicemail message from Mr. Grant stating that he had read the  
8 Court's published opinion ... that he was 'flabbergasted' by its contents ... that he did  
9 not agree with the Court's memorandum opinion and order ...." [Decl. at 3:21-23]<sup>1</sup>

10 2. "I spoke with Mr. Grant regarding the Trustee's intention to file a motion  
11 for reconsideration of the Order. He again confirmed that his client's decision not to  
12 oppose the Trustee's fee applications was made with full knowledge of their contents  
13 and implications ...." [Decl. at 3:25-27-4:1]

14 3. "[H]e [Mr. Grant] specifically recalled from his own personal knowledge  
15 the great difficulties the Trustee overcame in his efforts to close the unusually  
16 challenging sales of the Paso De Flora and Normandy properties ...." [Decl. at 4:2-4]

17 4. "Mr. Grant assured me that his client will not oppose the Trustee's motion  
18 for reconsideration." [Decl. at 4:4-5]

19 Further, the Declaration contains no legally cognizable "facts" supporting  
20 reconsideration but rather relies on such irrelevancies as, for example:

21 1. "I was shocked by its [the Memorandum Decision's] contents." [Decl. at  
22 3:7]

23 2. "I strongly believe that, based on my communications with many of the  
24 attorneys and parties in this case, their respective decisions (and those of the United  
25 States Trustee) not to oppose the Trustee's interim and Final Application were fully-  
26 informed, intentional decisions ...." [Decl. at 4:11-15]

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27  
28 <sup>1</sup> Mr. Grant is an attorney who represents a large general unsecured creditor in this case.

1           3. “The same creditors which bear the financial burden of the Trustee’s fees  
2 have given no hint of anything but gratitude for the Trustee’s level of expertise, the  
3 manner in which he served this Estate, and the results obtained.” [Decl. at 4:17-19]

4           In his zeal to point out his displeasure with the Court’s decision, Mr. Truxaw  
5 has placed himself in a position of being more than an advocate for his client and  
6 strayed perilously close to violating California State Rules of Professional Conduct  
7 Rule 5-200(E) prohibiting an attorney for improperly vouching for a client’s version  
8 of the facts in arguing a case to a judge. For all of the above reasons, the Court  
9 strikes Mr. Truxaw’s entire Declaration in support of the Motion.

10           What remains in support of the Motion is the Trustee’s attestation appended  
11 to the Motion itself stating that the statements therein are true and correct to the best  
12 of his knowledge, information and belief. [Docket #849] While that attestation might  
13 be sufficient were there any assertion of manifest errors of fact, law or newly-  
14 discovered evidence, this Motion is nothing more than an attempt to re-argue the  
15 Court’s decision.

16           The Court’s decision to deny the Trustee’s request for enhanced compensation  
17 was based, in part, on findings that this case was a nonoperating chapter 7 liquidation  
18 case; that it was relatively routine in nature in that it primarily involved the sale of  
19 real estate in an escalating real estate market; and the fact that in fulfilling his duties  
20 the Trustee employed and extensively relied upon numerous professionals all at  
21 significant expense to the estate. [Memorandum Decision at 3:4-5:19; 10:11-12:12]

22           The Motion argues reconsideration is appropriate because the decision was  
23 incorrect and manifestly unjust, and the Trustee was “shocked and surprised” by the  
24 ruling because, had the Court accepted the Trustee’s offer to present additional  
25 evidence, he could have presented evidence justifying an enhanced award. [Motion  
26 at 5:13-27] Specifically, the Motion argues the decision was based upon incomplete  
27 information regarding how other “comparably skilled” practitioners are compensated.  
28 This evidence would have been helpful if compensation had been awarded at a rate

1 *less* than the Trustee's normal hourly rate. However, the decision plainly states that  
2 the Trustee was compensated on a straight hourly rate basis at his normal billing rates  
3 of \$325-\$350/hr., which rates are slightly higher than the rates of other standing panel  
4 trustees and are also higher than the rates charged by the Trustee's own seasoned  
5 professionals employed to represent the estate. [Memorandum Decision at 12:1-12  
6 and n. 11]

7 Moreover, even if the Court had permitted this additional evidence, and even  
8 if the Trustee presented evidence of comparably skilled professionals who  
9 *customarily* receive \$1,413.63/hr. for services in nonbankruptcy, nonoperating real  
10 estate cases, this is only *one of the criteria* to evaluate in determining reasonable  
11 compensation for a trustee. [See Memorandum Decision at 6:15-7:8] The Court  
12 would not find this single criteria alters its finding that reasonable compensation for  
13 the Trustee's services in this case is his documented hours multiplied by his normal  
14 hourly rates.

15 The claim that the Trustee was surprised by this Court's decision because  
16 earlier he had been awarded interim fees without comment is without merit. The  
17 granting of the Trustee's first request for interim compensation is not a basis to find  
18 the Court's final compensation award was in error. The Motion acknowledges that  
19 an interim compensation award is *always* provisional. [Motion at 14:8] Further, the  
20 order approving the Trustee's First Interim Fee Application expressly provided it was  
21 an *interim* order and it warned that "[a]ll fees and costs allowed by this order may be  
22 subject to disgorgement." [Docket #559] The Trustee has cited no legal authorities  
23 indicating that a lesser final fee award is appropriate only in the case of administrative  
24 insolvency or malfeasance.

25 Finally, the Motion states the Court already requested supplemental  
26 information concerning the qualifications of John Standly and, upon receipt of this  
27 information, it awarded the Trustee interim compensation for Mr. Standly's time. The  
28 Motion suggests that having made an interim award which included those charges,


1 the Court's disallowance is somehow unfair. The Court has reviewed Mr. Standly's  
2 qualifications set forth in the Trustee's supplemental declaration and finds that his  
3 qualifications are those of an "attorney," and he was actually utilized and billed as an  
4 "attorney" in this case. [See Supplemental Declaration of Richard M. Kipperman filed  
5 October 3 at ¶ 25 (Docket #510); *see also* Second and Final Fee Application at 8:7-8]  
6 As set forth in the Memorandum Decision, the law of this Circuit permits a trustee to  
7 be compensated for "paraprofessionals" who perform duties of the trustee, but a  
8 trustee must employ "professionals" under § 327. [Memorandum Decision at 12-13]

9 **III.**

10 **CONCLUSION**

11 The Court reached its ruling in the Memorandum Decision only after careful  
12 review of the record, and it was able to review the entire record only upon receipt and  
13 review of the final fee applications of Trustee and all of the professionals he hired to  
14 assist him in this case. The Court does not believe that any of the above arguments  
15 raised in the Motion present an instance of a manifest error of fact or law or newly  
16 discovered evidence warranting reconsideration of the Court's order awarding the  
17 Trustee compensation for his documented hours multiplied by his normal hourly rate  
18 of \$325-\$350/hr. The Trustee's requested compensation equating to paying the him  
19 \$1,413.63/hr. is *not* reasonable compensation for this case. Accordingly, the  
20 February 3, 2005 hearing is vacated.

21  
22  
23 Dated: 12 June 05

  
LOUISE DE CARL ADLER, JUDGE

1 CAD 168  
2 [Revised July 1985]

3 UNITED STATES BANKRUPTCY COURT  
4 SOUTHERN DISTRICT OF CALIFORNIA

5 Case No. 02-01762  
6 Case Name: In Re: DAVID L. PRUITT and  
7 SEA COAST GREENHOUSES, LLC

8 CERTIFICATE OF MAILING

9  
10 The undersigned, a regularly appointed and qualified clerk in the Office of the United  
11 States Bankruptcy Court for the Southern District of California, at San Diego, hereby  
12 certifies that a true copy of the attached document, to-wit:

13 MEMORANDUM DECISION DENYING MOTION  
14 FOR RECONSIDERATION AND VACATING HEARING DATE

15 was enclosed in a stamped and sealed envelope and mailed to the following parties at their  
16 respective addresses listed below:

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29 The envelope(s) containing the above document was deposited in a regular United  
30 States mail box in the City of San Diego in said district on January 12, 2005

31 CAD 168

 , Deputy Clerk  
Roma London